No. 15,823

United States Court of Appeals

For the Ninth Circuit

ERIC SOBY, d/b/a Soby Painting Co., and UNITED STATES FIDELITY AND GUARANTY COMPANY,

Appellants,

vs.

LLOYD W. JOHNSON and MAX J. KUNEY, d/b/a Kuney Johnson Company,

Appellees.

Appeal from the District Court for the District of Alaska, Third Division

BRIEF OF APPELLANTS

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JURISDICTIONAL STATEMENT

The District Court had jurisdiction of this case by virtue of the provisions of 40 U.S.C. 270 *et seq.* (49 Stat. 794), the so-called "Miller Act". On May 2, 1957, this Court acquired, and therefore now has, jurisdiction pursuant to 28 U.S.C. 1291, which then provided[1]

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[1]Public Law 85-508, approved July 7, 1958, effective upon the admission of Alaska into the Union, eliminated the provisions which gave this Court jurisdiction of appeals from the District Court for the Territory of Alaska and established a United States District Court for the State of Alaska. Nothing in that Act, of course, expresses any legislative intent to deprive this Court of

that the courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, etc., except where a direct review may be had to the Supreme Court; and 48 USC 1294 which designates this Court as the appropriate court for appeals from such judgments in the District Court for the District of Alaska.

STATEMENT OF THE CASE

The Pleadings[2]

Appellant Soby filed his Amended Complaint on the 26th day of September, 1956, alleging that appellees were prime contractors under contract with the United States to construct a housing project at Ladd Air Force Base at Fairbanks, Alaska. A portion of the construction work involved the application of sheetrock to the walls and ceilings of the housing units and upon application of such sheets to the walls and ceilings there was required to be applied—to make the surfaces of the walls and ceilings suitable for painting—a process known as taping and spackling which involved applying tape and a plaster solution to the edges of the sheets and between the sheets and the woodwork, to obtain a smooth surface. This advance preparation, together with the painting process of the interior of

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jurisdiction over cases acquired prior to the effective date of such change or, for that matter, to deny retroactively to litigants from Alaska, the right of appeal. The Miller Act, obviously, covers subject matter directly within the cognizance and competence of a United States District Court (See: 28 U.S.C. 1331).

[2]Transcript of Record (T.R.), at pp. 3-50.

the units, was subcontracted by the prime contractor to the appellant Soby who was a painter. The taping and spackling, being a construction specialty, not coming under the work jurisdiction of painters, was in turn subcontracted to a third party by appellant.

Appellant Soby complained that the appellees used inferior and damaged sheetrock, containing excessive moisture, in surfacing the walls and ceilings; that such inferior and damaged sheetrock made the cost of taping and spackling substantially more than the amount for which the appellant Soby had agreed to do the work; and that when the painting of the interiors was commenced and partially completed, the appellees introduced a high degree of heat into the units causing shrinkage in the materials to occur by evaporation of the excessive moisture, destroying the painted surfaces, causing the sheetrock to buckle, the nails to pop and cracks to appear. The destruction of the painted surfaces by such shrinkage made it necessary for appellant to return to units already completed and repaint the interiors, many of them as much as four times each, all to the effect that before some of the units were even partially painted, appellant Soby had performed repainting to such an extent that his costs were far in excess of any profit he might realize from the performance of his contract, and that the additional costs of performing the remainder of the work, plus the constant repainting resulting from shrinkage, could not be reimbursed within the terms of his contract. Appellant Soby, who was operating on a close margin, was forced into insolvency, and was unable to finish much

of the work included in his contract. Appellant Soby alleged further that by reason of the excessive costs he had been put to by the improper work of the prime contractor, he was compelled to temporarily discontinue performance of the contract. He sought to recover against appellees for his additional expenditures and for his loss of profits, the sum of $133,662.39. Appellees answered and denied the allegations of faulty workmanship; denied the use of materials containing excessive moisture; and also denied that the work subcontracted for by appellant could have been completed at a profit.

Appellees, having answered the complaint, cross-claimed against appellant Soby, alleging that on or about December 19, 1953, he breached his contract and voluntarily removed all of his workmen from the project and ceased the performance thereof; and never, at any other time, returned to continue the performance of the contract. They further alleged, that by reason of appellees' contractual responsibility to the United States to finish the project, appellees were obligated to complete the unfinished work and did so to the satisfaction of the United States, advancing for such performance their own funds in the sum of $81,009.85, for which they sought reimbursement.

A second cross-claim filed by appellees alleged that in addition to the prime contract work undertaken by appellees at Ladd Air Force Base, Fairbanks, Alaska, under which appellant Soby had a subcontract for taping, spackling and painting, the appellees had entered into a second prime contract with the United

States for the performance of work in connection with airmen's dormitories and a mess hall at Eielson Air Force Base, Alaska, and that the taping, spackling and painting portions of said contract were subcontracted to appellant Soby who, having entered upon the performance of such work, failed to complete the same and on or about December 19, 1953, removed all workmen from the project and ceased doing any work in connection therewith; and thereafter failed to perform the work necessary to complete said project; that the appellees were required to enter into the project and complete the unfinished work; and that the cost of completing the unfinished work was in the sum of $53,955.43 which further sum appellees claimed as reimbursement from appellant. It is with the issues raised by this claim and the judgment thereon, that this appeal is primarily concerned.

The Evidence

In the analysis of the evidence adduced at the trial in the court below, appellants herein will limit themselves to the facts pertinent to the issues raised in the specification of errors on this appeal. Specifically, the evidence set forth in greater detail below concerns itself with the issues of law and fact raised by appellees'[3] second cross-complaint, pertaining to alleged damages arising from a claimed breach on the part of appellant[4] Soby when he assertedly breached a contract for the performance of work and labor, and the

[3]defendants below
[4]plaintiff below

furnishing of materials, as a painting subcontractor, on a general government building contract held by appellees with respect to military installations at Eielson Air Force Base, near Fairbanks, Alaska.[5]

As has been shown in the discussion of the pleadings, above, appellees in their second cross-complaint alleged that they had been thus damaged in the sum of $53,-955.43 and in proof thereof evidence was introduced on behalf of the appellees, to the effect that they had expended this sum in payment of claims submitted to them by another painting subcontractor, one Harold Larsen. Larsen had been substituted for the appellant Soby when the latter terminated (or as appellees contended below, abandoned) his services under the contract, which he claimed were made impossible of performance by failure of appellees to comply with the stipulations of such contract.

Except for a set-off of $3,000.00 for the value of equipment and materials belonging to appellant Soby and admittedly taken over by appellees, the court allowed appellees' (defendants') claim as set forth in their cross-complaints in full, namely, the sum of $53,955.43 for the cost of having the Eielson painting contract completed by Larsen.[6]

Inasmuch as appellants' specification of errors limits the issues upon this appeal to those applicable

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[5]As the pleadings fully set forth the undisputed background facts, references to those portions of the voluminous transcript have been omitted.

[6]T.R., at pp. 93-95

to the Eielson contract, the analysis of the evidence and the argument to follow, will be likewise so limited.

The record shows that the total contract price for the Eielson subcontract between appellant Soby and appellees, (exclusive of extras), amounted to $73,-662.00.[7] Thus the sum of $53,955.43 paid by appellees to Larsen and awarded to them by the court below as their measure of damages for the completion of the sub-contract allegedly abandoned by appellant, amounted to over 73 percent of the total agreed net contract price. It is appellants' contention that this award was excessive and is unsupported by the evidence, which appears to be uncontradicted to the effect that at the time Larsen was substituted as subcontractor for the appellant Soby, the Eielson contract, with respect to painting, had been performed to a completion of in excess of 91 percent, *(vide infra)*.

In this connection, it is significant to note that the evidence shows that Larsen was able to take over Soby's work force, materials and equipment[8] and that it was conceded that Soby had no difficulty producing satisfactory work on his Eielson contract[9] (hence no duplication of work was required).

On December 30, 1953, after appellant Soby had left the job and before appellees had undertaken to complete it, appellees prepared and filed with the Contracting Officer for the United States an estimate of

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[7]T.R., at p. 44
[8]T.R., at p. 1193
[9]T.R., at p. 62

completion of the Eielson project, for the purpose of obtaining advance payment for work performed.

This payment estimate was introduced into evidence as plaintiffs' Exhibit No. 46-1 (appellants' Appendix 1 hereto) and contains a certification on the part of appellees, to the effect that the Eielson project (identified as Contract No. 385) was 97.8 percent complete. There was also introduced in evidence as plaintiffs' Exhibit 46-2 (appellants' Appendix 2 hereto) a certificate of the Resident Engineer, the authorized representative of the United States Government with respect to this project, to the effect that the work was 97.85 percent completed, as claimed by appellees in the estimate just referred to. The evidence further shows that threafter appellees were paid and accepted payment from the United States Government on the basis of 97.85 percent of completion.[10]

Trial was had in the District Court for the Territory of Alaska, Third Division, before the Honorable J. L. McCarrey, Jr. who, having previously held a pre-trial conference, opened the trial and commenced the taking of testimony on the 26th day of September, 1956. Testimony in support of the various claims of appellant and appellees, and defenses, cross-claims and defenses to cross-claims continued from day to day through the 27th day of October, 1956. At that time, arguments having been made to the court by respective counsel, the court took the matter under advise-

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[10]T.R., at p. 1200. (This includes completion of "interior finish" at the rate of 91.18 percent, as shown on plaintiffs' Exhibits 46-1 and 46-2; Appendices 1 and 2, *infra).*

ment and, on or about the 9th day of January, 1957 the court entered its written opinion deciding the case and finding that the cross-claimants were entitled to $81,625.85 on their first cross-claim and the sum of $53,955.43 on their second cross-claim, and allowing appellant, by way of off-set, the sum of $3,000.00, making a net sum due appellees, on their cross-claims, of $132,581.28, together with interest at the rate of six percent per annum from September 1, 1956.

The following, more detailed, excerpts from the evidence, illustrate the points in issue on this appeal:

MAX KUNEY, one of appellees, in a letter[11] dated December 29, 1953, (defendants' Exhibit J), addressed to A. W. Murray, attorney for the appellant Soby's surety, referring to a conference attended by himself, Lloyd Johnson, his partner, and Messrs. A. W. Murray, Prince and Douglas, for the surety, stated as follows:

> "It was agreed that Soby's had no trouble producing satisfactory work on his Eielson contract, but that all his trouble was on the Ladd contract. On both jobs the material specified was identical, applied to identical surfaces and the specifications were identical in every respect except 3 coats were required at Eielson and 2 coats were required at Ladd.
>
> "Mr. Johnson stated the difference in results were entirely because Soby gave better supervision and workmanship to the Eielson job and Mr. Douglas commented that he had found that the

[11]T.R., at pp. 62-63.

painting work rejected in Building 12 at Ladd was because of poor workmanship and was properly rejected."

The witness, HAROLD STENSON, General Superintendent for appellees, called to testify by appellees, on direct examination by appellees' attorney testified commencing at page 1134 of the transcript of record, with respect to the satisfactory work performed by appellant as follows:

"Q. How many buildings did you have at Eielson?

A. We had a messhall and five 3-story airmen's dormitories.

Q. Now, how much of the painting work in those buildings had been completed at the time Soby left?

A. The three buildings—no, the two buildings and the messhall was satisfactory to the R. E.[12] inasmuch as they called A.I.O.[13] to inspect it. Of course, then they come along and picked up a lot of little items. Now, that was the middle of December.

Q. And had the other buildings been completed?

A. No.

Q. Did you have occasion during the job to observe the painting work that the Soby Painting Company did at Eielson?

A. Oh, yes. Sure I did.

Q. What was it?

A. It was a much better job than was done on Ladd."

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[12]Resident Engineer

[13]Airforce Installation Officer

The same witness testified again, commencing on page 1155 of the transcript of record, as follows:

"Q. What, if anything, did Mr. Douglas say specifically about the quality of the work at Ladd?

A. He says it is awful.

Q. Was anything specifically said about the quality of the work at Eielson?

A. Eielson work looked all right to him which we didn't have any particular troubles out there.

The Court: Wait a minute. That doesn't have any probative value as far as this case is concerned. Will you read the answer back and I will explain to counsel why.

(Thereupon, the Reporter read the Answer, Line 22, previous page.)

The Court: Well, the court of it's *(sic)* own motion rules that that be stricken and to answer the question as directly asked.

Q. (By Mr. Olwell): Did you have any specific conversation with Mr. Douglas concerning the work at Eielson? In other words, did Mr. Douglas say anything about the work?

A. We looked over the work at Eielson and the work at Eielson looked all right.

Q. Did Mr. Douglas say anything about it?

A. No, I can't recall that he made any particular comment. I just can't recall that.

The Court: Well, the court again would strike that first answer from the record because it doesn't have any probative value. It is a conclusion that the witness states himself.

Mr. Olwell: If it please the court, the only purpose of my asking the question was that he had stated that he went to Eielson, therefore, I asked him if anything was said. He has now said he doesn't recall that Mr. Douglas said anything.

The Court: Excepting I would ask that the prior answer be read back to counsel so that you will see why the court has asked that it be stricken, if you please."

Same witness at page 1172:

"Q. Would you describe the work at Eielson, that is, the painting and taping work as generally satisfactory or acceptable?

A. Yes, generally so."

Same witness at page 1175 of the transcript of record:

"Q. How was the painting work at Eielson accomplished?

A. Soby had a foreman out there named Stover and he handled that in pretty fair shape.

Q. Did you have any——

A. Soby would go out there—make a trip out there each time he was up to Fairbanks.

Q. Did you have any complaints about the painting workmanship that was done at Eielson?

A. Nothing unusual. We had some painting difficulties on the punch list, but as I recall it now, we didn't have any redo work.

Q. There was no redo work in the sense that it was required at Ladd, is that correct?

A. No, nothing.

Q. Was the work that had to be caught up after December 19 of a normal touch-up type work at Eielson?

A. Yes, that is all."

The same witness, Superintendent Stenson, testified commencing at page 1199 of the transcript as to the percentage of completion of the Eielson job as of the date appellees took over the job, as follows:

"Q. Now, Mr. Stenson, I hand you Plaintiffs' Exhibit 46-2[14] which is turned to a document which bears the date of 31 December, 1953. Would you examine the last document.

The Court: To any particular point? It is rather lengthy. Could you indicate which point you want him to refer to.

Q. Mr. Stenson, what does Item 3 of that document that you have before you relate to?

Mr. Olwell: If your Honor please, I think it speaks for itself.

Mr. Arnell: I realize that.

The Court: Could you lead the witness then. State, I call your attention to Item No. 3 which refers to——

Q. (By Mr. Arnell): Mr. Stenson, does Item 3 which relates to completion of painting at Eielson include the painting work?

A. Yes, it would.

Q. And as of the date of December 31, 1953, how much of that particular item of the contract had been completed?

The Court: Well, counsel, speed this up. You are on cross-examination. You may, therefore, ask leading questions.

Mr. Arnell: I understand that, Your Honor.

The Court: Why don't you then state, does that disclose so and so.

Q. (By Mr. Arnell): Mr. Stenson, does the figure of completion shown on that form total 98 point something percent complete?

A. These are the forms——

The Court: Just answer the question.

A. Will you state the question again.

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[14]Appendix 2, *infra*

Q. Does that form show this project was 98 point something percent complete for this particular unit of the contract?

A. This is it so far as I see. I have never seen this form before. I'd like to look at it a little more.

The Court: Does it or does it not?

A. This is the amount of money that was figured on this piece of paper. That is the amount of money Kuney-Johnson received.

The Court: Does that form in Item 3 disclose that the progress of that building was 98 point fraction complete at that date?

A. That is correct.

Q. (By Mr. Arnell): Did Kuney-Johnson get paid upon the basis of that percentage of completion, Mr. Stenson?

A. To my knowledge, yes.

Mr. Arnell: May I hand the exhibit back to the clerk, your Honor?

The Court: You may. Well, counsel, doesn't it disclose 97.85 percent complete.

Mr. Arnell: I am sorry if I made a mistake.

Mr. Olwell: 97.85 your Honor?

The Court: Yes, that is correct.

Mr. Olwell: Thank you."

Appellees called TOM CORBETT, Paint Superintendent for Larsen, who took over appellant's work at Eielson, as a witness and he testified with respect to the satisfactory work appellant did at Eielson as follows:[15]

"The Court: Now, do you have an opinion as to the type of workmanship that was performed

[15]T.R., at p. 1322

on Eielson? Now, of course, I am confining it to painting only. Pardon me. Of the work that was done by Mr. Soby at the time he went on the job.

A. Well, I only found one fault with Eielson. The Eielson job was very good and the only fault being that they had paint on the decks which were concrete and didn't call for any covering, any asphalt tile, and they had to be cleaned up. Outside of that the work had been going along all right."

Appellee, MAX KUNEY, taking the stand for the second time testified with respect to the completion of the work at Eielson, commencing on page 1559 of the transcript of record, as follows:

"Q. Now, Mr. Kuney, based on Plaintiffs' Exhibit 46-1,[16] if that exhibit showed as of the end of December, 1953, an average completion of all the project of approximately 93 or 94 percent, are you able to state how much money would be or how much the cost would be for finishing the work in accordance with the terms of the contract?

A. No. That again would have no relation to what it would cost to complete the contract. As a matter of fact, these estimates never in the business have much relation to actually what has been done at this stage of the game.

Q. Notwithstanding that you get paid the amount of money that is reflected by that exhibit, do you not?

A. Oh, yes, but towards the end of the job, when it is practically complete and there is a 5

[16]Appendix 2, *infra*

percent retainage being held it is quite often that in many cases, as far as the items themselves are concerned, they allow 100 percent on the items and just hold the 5 percent. That is common and naturally we'd accept it.

Q. Mr. Kuney, does not Plaintiff's Exhibit 46-2 reflect the actual progress of the work to the date specific in each of those instruments?

A. No, sir, it doesn't. It states on the face that it does, but, as I explained, it really has little application as is well known in our business, in our trade.

Q. Do you mean that the Government reported this particular item in the contract 97 percent complete and they paid you on that basis and yet you had not done that much work?

A. Yes, that can apply. I don't say we hadn't, understand, because—I do say this, that that is commonly done, to usually pay 99 percent just to show that there is a little something left to do—they could have done that here, as well as the 99 percent—then they hold the 5 percent retainage which they consider is enough to complete it.

Q. How much of that particular item in the contract had you completed on that date if it was not 97 percent?

Mr. Olwell: If your Honor please, I object to the form of the question because he just said 'how much of that particular item of the contract' without referring to what item. No one would know what he means.

The Court: You mean painting, do you not?

Mr. Olwell: Painting is not set forth on that exhibit. That is the reason for my objection.

The Court: Objection sustained. You may rephrase your question.

Mr. Arnell: May I look at the exhibit again, your Honor?

The Court: You may.

Q. (By Mr. Arnell): Directing your attention to plaintiff's Exhibit 46-2, Mr. Kuney, the third item is a lump sum price for construction of all the buildings at Eielson, is it not?

A. Yes, sir.

Q. Now, is it your testimony that, notwithstanding the fact that the Government paid you 97 percent, approximately, you had not done that amount of work on those buildings?

A. No, that is not my testimony.

Q. Well, actually then you had done that amount of work, had you not?

A. That neither is my testimony. We had——

Q. Well——

A. But my testimony is this: That we had actually done less than 97.85 percent.

Q. Of Item 3 on that exhibit?

A. That is right.

Q. Now, how much less?

A. Well, after December 31, as I recall, the painting alone cost $60,000.00, $70,000.00. I think that probably 95 percent complete would have been a more accurate estimate on the part of the Government than 97.85."

The substance of the foregoing testimony of appellees' own witnesses may thus be deemed to be undisputed. It was on this evidence, then, that the District Court must have based that portion of the judgment here appealed from.

ISSUES PRESENTED AND SPECIFICATION OF ERRORS

1. *Where a painting subcontractor under a general building contract terminates his performance at a time when, according to official government certificate, his work has been completed in excess of 91 percent and the general contractor receives payment from the government of a like percentage of the contract price, is a subsequent expenditure, by the general contractor, of an additional 73 percent of the total contract price, for the purpose of completing the approximately 8 percent of the work remaining unfinished, such a reasonable expense in mitigation of damages, as to permit recovery of the full amount so expended by the general contractor from the painting subcontractor as damages for the latter's alleged breach in terminating performance?*

Appellants contend that the District Court erred in awarding to appellees roughly $54,000.00, or approximately 73 percent of the total contract price for a painting subcontract at Eielson Air Force Base, near Fairbanks, Alaska, where undisputed testimony and documentary evidence show that appellees expended such sum to complete approximately 8 percent of the contract which had remained unfinished when appellant Soby terminated performance (claiming a breach of conditions and violation of specifications on the part of the appellees) and where it further appeared that appellees, upon certification by the government of approximately 98 percent completion of the contract and approximately 92 percent completion of the subcontract, received like percentages of the full contract

price; that appellees' substitute subcontractor was able to take over the work allegedly abandoned by appellant Soby, without unnecessary delay, and with said appellant's full and competent work force, materials and equipment; and that, because of satisfactory performance of the work completed by appellant Soby, it was not necessary for such substitute subcontractor to re-do any of the work included in the percentage completed by appellant Soby and for which payment was received by appellees as aforesaid. Appellants further contend that the District Court's award to appellees (defendants below) of the full amount of damages claimed in their second affirmative defense and cross-complaint, with respect to the Eielson Air Force Base subcontract, is excessive and that the District Court's Finding of Fact No. XIII, with respect thereto, and the conclusions of law based thereon, are clearly erroneous, are unsupported by any substantial evidence in the record and contrary to the rules of law applicable to the measure of damages recoverable for breach of contract.

2. *Upon the facts set forth in specification of error No. 1 above, was it proper for the District Court to award interest upon the total amount of the judgment to appellees (defendants below) from and after September 1, 1956, a date seven months and 11 days prior to the date of said judgment and the ascertainment of the theretofore wholly unliquidated amount of damages?*

Appellants contend that upon the undisputed facts and documentary evidence in this case, and assuming,

arguendo, that appellant Soby breached his contract when he (as alleged by appellees) abandoned performance, such damages as could be recovered by appellees by virtue of such breach, namely, the fair and reasonable market price of completing their performance, less credit for materials and equipment on hand and belonging to appellant Soby, were wholly unliquidated and were not and could not be finally ascertained, until after resolution of conflicting claims and counter-claims by the trier of the facts in this case and judgment thereon and hence allowance of interest on the full amount of the judgment, from and after an arbitrary date 7 months and 11 days prior thereto, was wholly unwarranted.

3. *Is there evidence in the record to support that portion of Finding of Fact No. XIII and the judgment thereon, which held appellant Soby (plaintiff below) to be entitled to an off-set in the total sum of $3,000.00 only for the supplies and materials taken over by appellees instead of the true value thereof in the sum of $5,768.50, as claimed by appellant Soby?*

Appellants contend that the set-off thus allowed against appellees' (defendants below) aforementioned cross-complaint is insufficient, arbitrary and not supported by the evidence in the record of this cause.

ARGUMENT

1. **WHERE A PAINTING SUBCONTRACTOR UNDER A GENERAL GOVERNMENT BUILDING CONTRACT TERMINATES HIS PERFORMANCE AT A TIME WHEN, ACCORDING TO DOCUMENTARY PROOF IN THE FORM OF OFFICIAL GOVERNMENT CERTIFICATES, HIS WORK HAS BEEN COMPLETED IN EXCESS OF 91 PERCENT AND THE GENERAL CONTRACTOR RECEIVES PAYMENT FROM THE GOVERNMENT FOR SUCH WORK, AT A LIKE PERCENTAGE OF THE CONTRACT PRICE, A SUBSEQUENT EXPENDITURE, BY THE GENERAL CONTRACTOR, OF AN ADDITIONAL 73 PERCENT OF THE TOTAL CONTRACT PRICE, FOR THE PURPOSE OF COMPLETING THE APPROXIMATELY 8 PERCENT OF THE WORK REMAINING UNFINISHED, IS NOT SUCH A REASONABLE EXPENSE IN MITIGATION OF DAMAGES, AS WILL PERMIT RECOVERY OF THE FULL AMOUNT SO EXPENDED BY THE GENERAL CONTRACTOR FROM THE PAINTING SUBCONTRACTOR AS DAMAGES FOR THE LATTER'S ALLEGED BREACH IN TERMINATING PERFORMANCE AND SUCH AN AWARD IS EXCESSIVE AND UNWARRANTED.**

Even in cases where the stricture of Rule 52(a) of the Federal Rules of Civil Procedure is applicable,[17] findings of a trial court sitting without a jury will be reversed, even if there is evidence to support them, when the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

United States v. United States Gypsum Co. (1848), 333 US 364, 394-395, 68 S.Ct. 525, 92 L.ed. 746.

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[17] "* * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. * * *".

In such cases, moreover, it has been said that while appellate courts should be slow to impute to trial courts a disregard of their duties and responsibilities or a want of diligence or perspicacity in evaluating the credibility of witnesses and the weight of evidence, the reputation and standing of the trial judge for experience, discernment, detachment, reliability, carefulness, probity and other qualities that combine to make judgment the master's art cannot and should not be ignored and hence an important factor in applying the rule is the reliability of the trier of the facts.

5 Moore's Federal Practice (2d ed.) 2616.

The present case, however, is not subject to such narrow limitations upon review, since, as the foregoing statement of the facts discloses, the challenged findings of fact and conclusions of law of the District Court are based on documentary evidence and uncontradicted testimony and are hence subject to free review unaffected by presumptions which ordinarily accompany findings on controverted issues.

Carter Oil Co. v. McQuigg (CCA 7th, 1940), 112 F.2d 275.

Findings of fact based on such evidence, where credibility is not seriously involved or, if it is, where the reviewing court is in just as good a position as the trial court to judge credibility, are not binding on the appellate court and will be given slim weight on appeal.

Equitable Life Assurance Soc. of U. S. v. Irelan, (CCA 9th, 1941), 123 F.2d 462;

Smith v. Royal Insurance Co., Ltd., (CCA 9th, 1942), 125 F.2d 222, cert. den. (1942) 316 US 695, 62 S.Ct. 1291, 86 L.ed. 1765;

Johnson v. Griffith S. S. Co., (CCA 9th, 1945), 150 F.2d 224, 225;

Pacific Portland Cement Co. v. Food Mach. & Chem. Corp., (CA 9th, 1949), 178 F.2d 541.

And see:

Yankwich, Findings in the Light of Recent Statutory Amendments (1948), 8 FRD 271, 281-282.

The applicable rules have been clearly spelled out by Judge Frank, speaking for a majority of the Second Circuit, in *Orvis v. Higgins* (CA 2d, 1950), 180 F.2d 537, 538, cert. den. (1950) 340 US 810, 71 S.Ct. 37, 95 L.ed. 595, as follows:

> "* * * Where a trial judge sits without a jury, the rule varies with the character of the evidence: (a) if he decides a fact issue on written evidence alone, we are as able as he is to determine credibility, and so we may disregard his finding (citing authorities). (b) Where the evidence is partly oral and the balance is written or deals with undisputed facts, then we may ignore the trial judge's findings and substitute our own (1) if the written evidence or some undisputed fact renders the credibility of the oral testimony extremely doubtful (citing authority), or (2) if the trial judge's finding must rest exclusively on the written evidence or the undisputed facts, so that his evaluation of credibility has no significance (citing authorities). * * *"

And see also:

Kwikset Locks, Inc. v. Hillgren, (CA 9th, 1954), 210 F.2d 483, cert. den. (1954) 347 US 989, 74 S.Ct. 852, 98 L.ed. 1123;

Stevenot v. Norberg, (CA 9th, 1954), 210 F.2d 615.

Professor Moore, in commenting on the rule as thus enunciated by Judge Frank and consistently followed in this Circuit, says:

> "* * * The intent as written in Rule 52's recipe on the scope of appellate review singles out the case where the trial court had 'the opportunity * * * to judge of the credibility of the witnesses', and he has no such opportunity relative to non-demeanor testimony. And for litigants the pudding is the pay-off, not the cook's intent. Aside from the intrinsic persuasiveness of Judge Frank's opinion, its theory is a natural and proper concomitant of appellate power. It probably will and should commend itself to other circuits."
>
> 5 Moore's Federal Practice 2642.

Applying these rules to the case at bar, we then find the following:

(1) Documentary evidence, in the form of official government certifications (Appendices 1 and 2, *infra*) established the fact that, at the time of termination of appellant Soby's work, the Eielson building contract was completed almost 98 percent overall, and in excess of 91 percent with respect to the interior finish; and appellees applied for and received payment in full, based upon these completion percentages;

(2) Uncontradicted testimony, in the nature of admissions by appellees' own witnesses, established the fact that appellant Soby's work at Eielson was satisfactory and that it was not necessary to re-do any part of his work, when the substitute subcontractor, Larsen, took over to complete the unfinished 8 percent of interior finishing work.

Nothing here involves demeanor testimony, or the credibility of witnesses, except possibly the purely argumentative and entirely self-serving statement on the part of appellee Kuney, to the effect that these certificates do not mean what they say, even though he admits to receipt of payment in full based thereon. Yet even Kuney, when pressed for greater specificity finally admits the accuracy of these reports within narrow limits, by stating "I think that probably 95 percent complete would have been a more accurate estimate on the part of the government than 97.85."[18]

Obviously, when confronted with the fabulous discrepancy between his own completion estimates and the government certificates, on the one hand, and the exorbitant price for completion paid to Larsen, on the other, the only thing Kuney *could* do was to attempt to belittle the significance of this documentary evidence. It would certainly have been too much to expect for him to admit that this variance was due to outrageous padding, feather-bedding and profiteering, resulting from the collusion of the general contractor and his hand-picked substitute subcontractor, bliss-

[18]T.R., at p. 1562.

fully secure in their knowledge that their platinum-plated performance would come out of the pocket of the appellant United States Fidelity and Guaranty Company, as surety for Soby.

Yet somewhere, somehow, in a strange but irresistible way, this tenuous argument must have fastened itself upon the mind of the fact finder, when several months later it blossomed forth in his opinion in the following remarkable statement:

> "The percentage of plaintiff's completion when the plaintiff abandoned the contracts, under each contract and in each building, within the contracts, posed a problem of mean concern throughout the trial. The vexation to this question was multiplied by the percentages of completion reflected in the government required reports (plaintiff's exhibits 35 and 36, etc.).
>
> *"While the government reports are informative, I am of the opinion that they are of little aid to the court in the determination of this problem, since the weight of evidence I find to be that such reports are only relative, and, generally speaking, little weight is attached to them by the contractor."*[19] (Emphasis supplied.)

The italicized portion of the above quote contains, in encapsulated form, the prejudicial error of which appellants complain. Faced with these documentary proofs, counter balanced by nothing more than a feeble argument against their credibility, by the very contractor who in reliance thereon has collected dollars from the government, the trial court confuses argu-

[19]T.R., at p. 68

ment with evidence and, so far from determining credibility, rejects that which is inherently credible in favor not of testimony, but conjecture, proceeding from unwarranted assumption to erroneous conclusion. The court below finds that "such reports[20] are only relative" and one may appropriately ask, *relative to what?* If by "relative" is meant unreliable, based on what "weight of evidence" does the court below so find? Even appellee Kuney himself—the last person whose word should be taken with respect to the reliability of government reports which on their face contain his own admissions impeaching his unconscionable claims—would go no farther than to quibble over the difference between 95 percent and 97.85 percent. Does this justify the finding just quoted? Even the statement "little weight is attached to them[20] by the contractor", while certainly of dubious probative value, is belied by the contractor's own admissions in the record, just referred to.

Appellants willingly concede that, accepting, as they must at this stage of the proceedings, the premise that appellant Soby abandoned the contract, the appellees are entitled to recover such a sum as will put them in as good a position as if the contract had been performed, and where the defect is remediable from a practical standpoint, recovery should be based on the fair market price of completing or correcting the performance. This is so, because under the generally applicable rules of law of contracts the person in-

[20]The government certificates referred to above, appendices 1 and 2, *infra.*

jured by the breach may recover as part of his damages expenses incurred in the exercise of reasonable diligence to prevent or minimize the damage caused by such breach.

Applying this to the present case, then, the general contractor, having recovered 95 percent or more of his total contract price, was entitled to so minimize the consequences of the alleged breach on the part of appellant Soby, his paint subcontractor, as to avoid loss of the percentage retained by the government and to complete the contract to the government's satisfaction. Thus, he was clearly entitled to hire someone else to do the 8 percent of interior finishing work which appellant Soby had left undone at Eielson and indeed, appellant United States Fidelity and Guaranty Company authorized such completion.[21]

Expenses allowed under this theory, however, must be *reasonable.* Thus in the case of a breach of contract the owner is not justified in expending more than the contract (or, *mutatis mutandis,* the balance of the contract remaining unpaid or unfinished) is worth.

See: 15 Am. Jur., Damages, Sec. 147.

Where calculation shows that the amount of damages allowed is in excess of those proved or where there is no evidence whatever of a particular item of damages allowed, the award is excessive and will be set aside.

See: 15 Am. Jur., Damages, Sec. 230.

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[21]T.R., at p. 64.

Here simple calculations and common sense show that if appellant Soby had completed the Eielson painting contract, by doing the remaining 8 percent of the work, based upon the agreed contract price, the cost to appellees would have been approximately $5,900.00. Appellants concede, that a substitute subcontractor, taking over at short notice, might reasonably have exceeded this figure, although the evidence is undisputed that he was able to take over appellant Soby's work force, equipment and supplies and was thus in a position to complete the job without delay or unforeseen expenditure. It is also undisputed that he did not have to duplicate any of Soby's work because of the overall quality of the workmanship on the Eielson job. Can it then be said, *reasonably,* that when Larsen charged and appellees recovered, the sum of approximately $54,000.00, or better than nine times the value of the remaining portion of the contract, that these are reasonable expenses and proper damages? Or should not this Court, in the exercise of its appellate supervision, as well as of common sense and fair play, modify this unconscionable award to a figure which is compensatory rather than confiscatory or, at the very least, remand the case for ascertainment of such a proper figure? Appellants respectfully contend that it should.

2. UPON THE FACTS IN THIS CASE IT WAS IMPROPER FOR THE DISTRICT COURT TO AWARD INTEREST UPON THE TOTAL AMOUNT OF THE JUDGMENT TO APPELLEES (DEFENDANTS AND CROSS-COMPLAINANTS BELOW) FROM AND AFTER SEPTEMBER 1, 1956, A DATE 7 MONTHS AND 11 DAYS PRIOR TO THE DATE OF SUCH JUDGMENT BECAUSE THE AMOUNT OF SUCH DAMAGES PRIOR TO SUCH JUDGMENT WAS WHOLLY UNLIQUIDATED AND UNASCERTAINED.

The general rule with respect to the allowance of interest is that, in the absence of contract to the contrary, interest on money runs from the time when the money becomes due and payable. This rule has been codified in Alaska in Section 52-1-1, Alaska Compiled Laws Annotated 1949, and has been construed by this Court to mean that interest may be allowed in a judgment from a date prior thereto, where the money would have been due and payable at an earlier date and, after demand, payment was refused.[22]

The general rule further holds, however, that where claims involving money payments are unliquidated and involve sharply disputed items, interest should not be allowed prior to a decision of the amount due. While there are numerous cases involving building contracts, which have permitted interest to be allowed upon the award of damages for deviations or defective performance, it should be noted that all these cases involve claims based upon expressly stipulated contract prices, subject only to changes because of varying additions and deductions. In the present case, on the other hand, the claim upon which interest was al-

[22]*New York Alaska Gold Dredging Co. v. Walbridge,* (CCA 9th, 1930), 38 F.2d 199.

lowed, arises out of an alleged breach of contract, whereby the claimant has mitigated his damages by permitting someone else to complete the work required by the contract and now seeks the contract price paid for such completion not as a liquidated claim based upon agreement between the parties, but as his measure of damages.

This then, is not a liquidated claim, but comes within the old common law rule, which requires that a demand should be liquidated or its amount ascertained or readily ascertainable before interest can be allowed. Even the most recent liberalizations of this rule go no further than to hold that if the amount due is capable of being ascertained *by mere computation,* the allowance of interest is proper. On the other hand, where a claim arising on contract was based in whole or in part on a *quantum meruit,* and was further subject to a reduction in an unliquidated amount because of faulty performance of the contract, it has been held that interest should not be allowed on the amount found to be due.

Stephens v. Phoenix Bridge Co., (CCA 2d, 1905), 139 F. 248;

Excelsior Terra Cotta Co. v. Harde, (N.Y., 1905), 73 N.E. 494.

In the *Stephens* case, *supra,* it appeared that the action was brought to recover the reasonable value of the materials and labor furnished by the plaintiff for a viaduct which the defendants were erecting, under a contract between the parties by which the plaintiff undertook to complete the metal work of the structure

at a specified date, and "to be subject to a penalty of $100 per day for any time beyond that date". Performance was not completed by the plaintiff within the time specified in the contract, and on the trial it was not disputed that the reasonable value of the labor and materials was the contract price; but the defendants were not allowed a deduction of $100 per day for the delay, but were held to be entitled, by way of counterclaim, only to the actual damages sustained by them by the delay in the completion of the contract, and the plaintiff was held to be entitled to interest on any amount which the jury might find to have been owing by the defendants to the plaintiff when the demand became payable. The court held, however, that the sum owing from the defendants to the plaintiff was uncertain and unascertainable by computation at the time of the commencement of the action; it depended not only on what should be found to be the reasonable value of the materials and services furnished by the plaintiff, but also on the amount which it should be found ought to be deducted from the plaintiff's claim and this amount was likewise uncertain and unascertainable by computation. Hence, the court held that following the rules deducible from the New York decisions, in the absence of controlling decisions in the federal courts, interest was not allowable in the case.

In the *Excelsior* case, *supra,* which was an action to foreclose a mechanic's lien, filed for work done and materials furnished under a contract, it appeared that the complaint set up the contract, alleged its full per-

formance, and claimed a recovery, in addition to the contract price, for extra work done. The answer denied the allegations as to performance and as to extra work, and demanded, by way of counter-claim, a large sum of money for the damage occasioned by defective work and by delay in performance. The trial court made an allowance for the defective workmanship and delay in performance, disallowed the claim for extra work done, and allowed interest on the amount for which judgment was directed. It was held that a modification of this judgment, striking out the amount allowed for interest, was correct, as plaintiff's claims were, under the circumstances, unliquidated. The court said:

> "They were, in fact, upon *quantum meruit*. The finding of the trial court established that the claim under the contract was subject to a reduction, because of defective and dilatory performance, to the extent of nearly one-third of its amount; while the claim for extra work was wholly disallowed. This case comes within the authority of *Delafield v. Westfield,* (1899), 58 N.Y.S. 277, where the plaintiff's claim, which was in part upon contract, and in part for extra work, was reduced by an award of damages for failure in performance. The appellate division there held that, as the amount, when ascertained, was subject to a reduction for damages sustained by the defendant for improper performance of the work, and the amount due for extra work could only be ascertained by proofs, the plaintiff's claims were unliquidated, and that, therefore, interest was not recoverable."

This Court in the *Walbridge* case (note 22, *supra*), has indicated that where the action is upon mutual accounts between the parties which can only be ascertained by mutual set-offs and allowances, a claim would be held to be unliquidated. That interest is not recoverable on unliquidated claims has been reasserted by this Court fairly recently in an Alaska case, involving recovery by a seller from a buyer under an implied promise to pay a reasonable amount.

Columbia Lumber Co., Inc. v. Agostino, (CA 9th, 1950), 13 Alaska 34, 184 F.2d 731.

In the case at bar, we find a claim based upon an alleged breach of a contract for the performance of labor and furnishing of materials by appellant Soby, and a showing that appellees sought to cure this breach by securing the completion of his work through another subcontractor. They are, therefore, seeking damages measured by the reasonable cost of completing the contract, limited in turn by the fair market value of the services rendered by the substitute subcontractor. Against this, appellant Soby sought, and received, a set-off for the fair value of certain supplies, materials and equipment admittedly left behind by him and taken over by appellees in completing their work. It appears clearly upon the foregoing authorities, that under these circumstances the amount of money due to appellees was not fully ascertained until the date of judgment and that allowance of interest back dated to an arbitrary date, apparently picked at random, was unauthorized and should be modified.

3. THERE IS NO EVIDENCE IN THE RECORD TO SUPPORT THAT PORTION OF THE TRIAL COURT'S FINDING OF FACT NO XIII AND THE JUDGMENT THEREON, WHICH HELD APPELLANT SOBY (PLAINTIFF BELOW) TO BE ENTITLED TO AN OFF-SET IN THE TOTAL SUM OF $3,000.00 ONLY FOR THE SUPPLIES AND MATERIALS TAKEN OVER BY APPELLEES, INSTEAD OF THE TRUE VALUE THEREOF IN THE SUM OF $5,768.50, AS CLAIMED BY APPELLANT SOBY.

There is no dispute with respect to the assertion that appellee took over the materials, equipment and supplies belonging to appellant Soby which they found on the job when they retained Larsen to complete the contract. The only issue apparently was on the value of these items, which Soby claimed was in excess of $5700.00, but for which appellees had allowed only slightly over $600.00. Allowance by the trial court of the sum of $3000.00 is entirely arbitrary and wholly unsupported by any evidence whatsoever in the record. While the trier of fact is obviously free to choose between conflicting evidence, his findings must be supported by some competent evidence and by some discernible mental process of computation, evaluation or ascertainment. To pull a figure out of a hat, so to speak, is purely arbitrary and capricious. Accordingly, if this Honorable Court modifies the judgment or remands this cause for further proceedings, this modification to remand should include the item of set-off referred to hereinabove.

CONCLUSION

Based upon the reasons and the authorities stated above, appellants earnestly contend that the judgment below should be modified or, in the alternative, should be reversed and the cause remanded with instructions to make new findings upon the disputed items, either based upon the record as it now exists or upon such other evidence as may be necessary to make such determination.

Respectfully submitted,

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(Appendices Follow.)